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IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1974

No. 74-763

Aubrey Grossman,

Petitioner,

vs.

Donald Striepeke, Sheriff of
County of Sonoma, State
of California,

Respondent.

# PETITIONER'S REPLY BRIEF

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## INDEX OF AUTHORITIES


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| Cooke v. United States, 267 U.S. 517 | 3,4,7 |
| Ex Parte Terry, 128 U.S. 289 | 3,4,7 |
| Taylor v. Hayes, 494 S.W. (2d) 737 | 1,4,7,8 |

PETITIONER'S REPLY BRIEF

Respondent's brief makes a new argument, to-wit: Petitioner is not entitled to benefit from the decision in Taylor on the "right of a hearing" issue because he did not raise this issue in the Federal courts or the California appellate courts. He will demonstrate that this claim (which is, incidentally, unsupported by the Response) is simply not true.

When Judge Jones refused Grossman either a temporary stay or bail, and he was thereby imprisoned, under the stress of time-urgency a handwritten petition was prepared and filed in the Superior Court. It is set out as Exhibit A. As can be seen the Mayberry issue was not even stated and the "right to an hearing" issue was the only issue specifically described.

The Petition resulted in the issuance of an order to show cause hearing which recites, as the sole ground for its issuance, that

> "the Judge cited said Aubrey Grossman for direct contempt, without a hearing, at the close of the trial of aforesaid case."

After the Superior Court declined to issue a permanent Writ of Habeas Corpus the next filing was a Petition for Writ of Habeas Corpus in the California Supreme Court. Together with the Petition was filed a Memorandum of Points and Authorities. Point I of the Argument was

> "As the trial judge had become personally embroiled with Petitioner, he had a duty to refer Petitioner's alleged contempt for trial by another judge."

The very first argument under this point was:

> "The power to hold a person in contempt of court by summary process is

'arbitrary in its nature and liable to abuse...', Ex Parte Terry, 128 U.S. 289, 313 (1888). The exercise of this power 'is a delicate one, and care is needed to avoid arbitrary or oppressive conditions.' Cooke v. United States, 267 U.S. 517, 539 (1925). The courts have, therefore, limited the power to impose summary punnishment for contempt to 'the least possible power adequate to the end proposed.' Anderson v. Dunn, 6 Wheat (19 U.S.) 204, 231 (1821).

The cases cited and the quotations therefrom make abundantly clear that Petitioner's attorneys believed that, in the then state of the law, there was an integrated relationship between "the right to a hearing" and the "right to an unbiased judge". They further believed that the necessary argumentation was, first, the desirability of providing a hearing and avoiding summary punishment and, second, the enlargement of the "right to an unbiased judge".

We point out, in passing, that

Petitioner's lawyers' prescience is established by comparison with Taylor. In Taylor, also, the Court begins with the "right to a hearing," and, incidentally, relies on two of the three cases cited by Petitioner's counsel. Ex Parte Terry, 128 U.S. 289; Cooke v. United States, 267 U.S. 517.

The integration of these two rights is further asserted, in the same Memorandum in these words:

> "The trial being over, there was no reason why the trial court could not have ordered petitioner to show cause before a different judge why he should not be held in contempt. In that way, there would be not the slightest possibility that the question of contempt would be decided by a judge with any possible prejudice toward petitioner. Furthermore, the making of such an order to show cause would have afforded petitioner an opportunity to appear, represented by counsel with a clear notice of what the alleged contempt was and an opportunity for his counsel to study the transcript, read the pertinent

cases on the law of contempt, and argue the same in court."

Such an integration of the two rights was conceded by the Attorney General and the District Court of Appeal (to which the Supreme Court assigned the case). In his Points & Authorities, attached to his Return, the Attorney General states his first argument thusly:

> "Argument I. There is No Evidence Which Indicates that the Honorable James E. Jones, Jr. was Personally Embroiled with Petitioner, Thus He was Qualified to Hear the Contempt Case.
>
> "A trial court has inherent statutory power to exercise reasonable control over the trial in order to insure the orderly administration of justice and to maintain the dignity and authority of the court it has power to punish summary contempts committed in its immediate view and presence." [citing cases having nothing to do with recusal].

Examination of the opinion of the Court of Appeal will demonstrate that

it also (together with Petitioner and the Attorney General) began its discussion of the "embroilment" argument by citing cases on "right" to impose summary punishment. It takes care to define "summary" as referring to the character of the contempt proceeding, not its timing. (Petition for Writ of Certiorari, pg. H7).

The next court we come to is the United States District Court. There a Petition for Habeas Corpus was filed together with a Memorandum. The first point in the Memorandum is:

> I. AS THE TRIAL JUDGE HAD BECOME PERSONALLY EMBROILED WITH PETITIONER, DUE PROCESS REQUIRED THAT HE RECUSE HIMSELF AND REFER PETITIONER'S ALLEGED CONTEMPT FOR HEARING BEFORE ANOTHER JUDGE."

The argument is opened on this point, just as it was in the California Supreme

Court Memorandum. We quote the first paragraph:

> "The power to hold a person in contempt of court by summary process is 'arbitrary in its nature and liable to abuse...', Ex Parte Terry, 128 U.S. 289, 313 (1888). The exercise of this power 'is a delicate one, and care is needed to avoid arbitrary or oppressive conditions.' Cooke v. United States, 267 U.S. 517, 539 (1925). The courts have, therefore, limited the power to impose summary punishment for contempt to 'the least possible power adequate to the end proposed.' Anderson v. Dunn, 6 Wheat (19 U.S.) 204, 231 (1821)."

In terms of concepts developed, words used and authorities cited, Petitioner, in all courts, has asserted his claimed right to a hearing. (f.n.) The Attorney General's argument is reduced to the claim that in subtitling

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f.n. Judging by the opinion of the Kentucky Court. Petitioner Taylor also did not separately raise the "right to a hearing" point. Taylor v. Hayes, 494 S.W. (2d) 737.

his Argument Petitioner has only referred to a "Hearing" before another judge. In other words, he should have broken it up and said due process required (a) a hearing, and (b) this hearing before another judge.

Even the Common Law at its most technical would not be so demanding. We also point out the obvious ambiguity (necessary ambiguity) involved in any requirement to formulate "issues" or "questions for review", or "points of appeal." This Honorable Court's rule on the subject is contained in Rule 23, (1)(c).

We believe that a fair reading of all Supreme Court decisions prior to Taylor, shows an integration of the "right to a hearing" and the "right to an unbiased judge" (or "embroilment").

The Attorney General's entire argument is a truly extreme example of elevating form over substance.

Respectfully submitted,

Fay Stender

EXHIBIT A

SUPERIOR COURT

FOR THE COUNTY OF SONOMA

STATE OF CALIFORNIA

PETITION FOR WRIT OF
HABEAS CORPUS

IN RE AUBREY GROSSMAN:

WHEREAS, AUBREY GROSSMAN, attorney for Defendants in People v. Gary Stra, et al., #34644, 34746, 34751, is being held in custody under a 5-day jail sentence for direct contempt of court, for for acts allegedly committed during the course of trial of the aforesaid case on November 19, 1971; and

WHEREAS, the Judge, Honorable James E. Jones, Jr., cited said Aubrey Grossman for criminal contempt without a hearing despite a demand and refusal of same; and

WHEREAS, the order of contempt was reserved until the close of trial, and entered on November 23, 1971; and

WHEREAS, said Aubrey Grossman is being held unlawfully and without just and sufficient cause, and without a publication,

NOW, THEREFORE, Petitioner prays that a writ of habeas corpus be granted directed to the Sonoma County Sheriff, commanding him to have the body of Aubrey Grossman brought before this Court immediately and that he be restored to his liberty.

DATED: November 23, 1971.

/s/ Warren Wilson

/s/ Rex Sater

Attorneys for Aubrey Grossman